FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

BASIC PRODUCTS CORPORATION,

Appellant,

vs.

DAVID PATTON AND C. B. [illegible],

Appellees.

Appeal from the Court of [illegible]

APPELLANT'S [illegible] BRIEF IN OPPOSITION

[illegible]

No. 669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

BAIN PEANUT COMPANY OF TEXAS, ET AL, *Appellants*,

vs.

DAVE PINSON AND C. B. GUYGER, *Appellees*.

Appeal from the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees' motion to dismiss this appeal rests upon one ground only, and that ground is *dehors* the record before the Court. They contend that the petition for writ of error from the State Supreme Court to the Court of Civil Appeals should have been filed within 30 days after July 12, 1929; that failure to do so deprived the State Supreme Court of actual jurisdiction, and that its action in dismissing said petition as for want of jurisdiction evidenced its actual want of jurisdiction instead of its refusal to as-

sume its actual and potential jurisdiction to review the judgment of the Court of Civil Appeals. Four Texas Supreme Court cases are cited in support of that contention, viz:

Vinson v. Carter, 166 S. W. 363;
Henningsmeyer v. Bank, 195 S. W. 1137;
Smith v. Patton, 241 S. W. 113;
National Compress Co. v. Hamlin, 269 S. W. 1024.

As applied to the facts involved in those cases the decisions are each correct. But a different rule applies to this case. In the first case cited the original motion for rehearing was not filed in time. A motion for leave to file as of time was overruled. A second motion of the same nature was thereupon filed and overruled. The petition for writ of error was filed within 30 days after the order overruling the second motion, but more than 30 days after the order overruling the first. The original judgment and opinion were never modified. The Supreme Court treated the first order overruling the motion to file as of time as an order overruling the motion for rehearing and concluded that the 30 days time within which to file a petition for writ of error commenced running as of the date of that order. In the second case the first motion was overruled February 14, 1917, but attorneys for the moving party were not advised of that action until more than 30 days had expired. An exact copy of the original motion was again filed, to which was added only a statement as to the failure of the clerk to notify attorneys for movants of the courts' action on the original motion, and of their want of notice of its action until more than 30 days had elapsed. The Court of Civil Appeals there-

upon set aside its order overruling the first motion, and by the same order overruled the second motion. A petition for writ of error was filed within 30 days after the date of the second order. On motion the State Supreme Court dismissed the petition for writ of error, treating the last order as a mere subterfuge by the Court of Civil Appeals to extend the time within which movants might petition the Supreme Court for writ of error, saying:

> "There is nothing in this record which even remotely suggests that the order that set aside the former order, overruling the original motion, was for any other purpose than to permit the filing of the petition for writ of error as within the time required by law, in accordance with the appellants' request."

The original judgment was never modified or withdrawn In the case of *Smith v. Patton* there was no modification of the original judgment or opinion. The first motion for rehearing was overruled, and a motion was filed in the Court of Civil Appeals asking for permission to file a second motion for rehearing. While the latter motion was pending, but within 30 days after the order overruling the original motion, a petition for writ of error was filed in the Court of Civil Appeals. The State Supreme Court denied a motion to dismiss the petition for writ of error on the ground that the prayer for leave to file a second motion was addressed to the discretion of the Court of Civil Appeals and did not suspend its judgment or prevent the jurisdiction of the Supreme Court from attaching when the petition for writ of error was filed in time.

In the case of *National Compress Co. v. Hamlin*, the original motion for rehearing, filed within time, was overruled February 28, 1924. Written opinion on motion for

rehearing was filed March 6, 1924. On March 13, 1924, a motion was filed to certify the case to the State Supreme Court and that motion was overruled April 17, 1924; and on the same day Chief Justice Pleasants filed an opinion "correcting one paragraph of his opinion on rehearing, *but continuing no new ruling against plaintiffs in error.*" (Italics ours.) A second motion for rehearing was filed April 21, 1924, and overruled May 1, 1924; and on May 5, 1924, petition for writ of error was filed in the Court of Civil Appeals. We here quote from the language of Mr. Justice Greenwood:

> "When plaintiffs in error allowed 30 days to elapse from, not only the date of overruling their motion for rehearing, but from the date of filing of the opinion of Chief Justice Pleasants of March 6, 1924, the time had passed to invoke the appellate jurisdiction of this court to review the order refusing to grant the rehearing or any ruling embodied in Chief Justice Pleasants' opinion. *Had the Court of Civil Appeals rendered any decision against plaintiffs in error on April 17, 1924, or at any other time within 30 days before they filed their petition for writ of error, of a nature subject to review by this court, a different question would be presented.* This case is one where plaintiffs in error simply seek to use a second motion for rehearing as a means to secure an extension of time to complain of rulings made, *not on such second motion, but on a previous motion for rehearing.* A second motion cannot be used to accomplish any such end." (Italics ours.)

It will thus be seen that the first three cases cited have no application to the situation before this Court. The last case, instead of supporting appellees' contention, clearly supports that of appellants. That this is true will

be readily seen by referring to the opinion of Judge Leslie (R. 69), wherein it is stated:

> "On original hearing, the majority reformed the judgment of the trial court so as to exclude all items of recovery, except the actual purchase price paid by appellees for the peanuts. Both parties have filed motions for rehearing, the appellant insisting that the judgment of the trial court be reversed and remanded on account of the insufficiency of the evidence to support any recovery, and the appellees insisting that the judgment of the trial court be in all things affirmed. Appellant's motion for rehearing will be overruled."
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> * * * * *
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> "The judgment heretofore entered by this court, reforming the judgment of the trial court, and affirming same as reformed, is set aside and the original opinion withdrawn, and, in lieu thereof, judgment will be here entered in all things affirming the judgment of the trial court, and this opinion will be substituted for the original."

Article 1877, R. C. S. provides:

> "Any party desiring a rehearing of any matter determined by any Court of Civil Appeals, may, within fifteen days after the date of entry of the judgment or decision file with the Clerk of said court his motion for rehearing thereof, in which the ground relied upon for the rehearing shall be distinctly specified," etc.

The judgment and opinion complained of in the motion for rehearing filed July 12, 1929, (R-49) were therefore the only judgment and opinion of the Court of Civil Appeals, it having completely vacated, withdrawn and annulled its judgment and opinion of May 3, 1929; and the

motion for rehearing was filed within 15 days after the entry of the last and only existing judgment of that Court.

The State Supreme Court in the case of *Knox v. McElroy*, 103 Tex. 357; 127 S. W. 798, expressly held that a second motion for rehearing, followed by order of the Court of Civil Appeals overruling same, was not only proper but necessary before the State Supreme Court could take jurisdiction on petition for writ of error. In that case the Court of Civil Appeals struck out the statement of facts and thus affirmed the case on original hearing. Motion for rehearing was filed, the statement of facts reinstated and considered, the case was decided on its merits and affirmed. No motion for rehearing was filed to the second affirmance. The Supreme Court said:

> "In an ordinary case the rules of this Court require that as a prerequisite to the consideration of the assignments a motion for rehearing should be filed in the Court of Civil Appeals."

Plaintiff in error urged the Supreme Court to consider fundamental error. In that connection the Supreme Court further said:

> "But in this connection we may remark that we are not inclined to hold that if fundamental error is shown, it could be taken advantage of in this court, *without raising it in a motion for a rehearing in the Court of Civil Appeals.*" (Italics ours.)

In *Roth v. Murray*, 105 Tex. 6, 141 S. W. 515, the State Supreme Court issued a writ of mandamus to require the Clerk of the Court of Civil Appeals to file a petition for writ of error in that Court tendered more than 30 days after the original motion for rehearing was overruled but

within 30 days after a second motion was overruled. The opinion discloses that:

> "The second opinion, which decided the case on its merits, related to and adjudged wholly different questions. The second motion for rehearing, complained of and assigned error in respect to all the several matters discussed and decided in the second opinion."

In that case there was no difference between the original judgment and the judgment on original motion for rehearing. Each being an affirmance of the judgment of the trial court; but the opinions on original hearing and on first motion for rehearing were different. That circumstance as decided by the State Supreme Court, not only justified but required the complaining party to file second motion for rehearing as a prerequisite to the appellate jurisdiction of the Supreme Court.

Again, in the case of *United States Fidelity & Guaranty Company v. Henderson County*, 276 S. W., 203 (Sections 14 and 15. at page 209), the Commission of Appeals of Texas, with approval of the State Supreme Court, speaking upon this subject said:

> "The remaining assignments by the interveners all relate to the action of the Court of Civil Appeals in overruling various cross-assignments of error presented by the interveners. On the original hearing the Court of Civil Appeals sustained these cross-assignments, and only on a rehearing did that court make its order overruling them. No motion for rehearing was made in the Court of Civil Appeals by the interveners, and in this state of the record we are without authority to consider the matters complained of. It is well settled generally that the Supreme Court will not consider errors not properly assigned

in the motion for rehearing in the Court of Civil Appeals, and express application of this rule has been made where the supposed error was committed, not upon the original hearing, but upon a rehearing in the Court of Civil Appeals. *The motion for rehearing to form the basis for a consideration in the Supreme Court must be predicated upon the judgment of the Court of Civil Appeals actually deciding the matters complained of.* In Roth v. Murray, 105 Tex. 6, 141 S. W. 515, Mr. Justice Ramsey for the Supreme Court said: * * *

"This decision and the one cited (Knox v. McElroy, 103 Tex. 357, 127 S. W. 798) are conclusive against our authority to consider the question presented." (Italics ours.)

Regardless of anything else, the second motion for rehearing in the Court of Civil Appeals was addressed to *"the judgment of the Court of Civil Appeals actually deciding the matters complained of."* The record discloses that on July 12, 1929, the former judgment and opinion were withdrawn and the judgment and opinion of that date substituted, thus making it necessary to address the motion for rehearing thereto, there being no other judgment or opinion available for that purpose.

In the case at bar there was a material difference between both the original and substituted judgment and the original and substituted opinion, as is clearly disclosed by portions of the majority opinion hereinabove quoted at page 5. Copies of the original opinion and judgment of the Court so withdrawn and therefore annulled by the Court of Civil Appeals are set out in the Appendix hereto and certified copies thereof are submitted and tendered herewith for verification. It will be seen from the original majority opinion that the Court of Civil Appeals regarded

the former adjudication of this case by the Commission of Appeals as excluding appellees' right to recover anything except the difference between the purchase price and the sale price of the peanuts. The District Court judgment, (R. 19), was for $6805.40. The original judgment of the Court of Civil Appeals, (Appendix 1), was for $5759.21—a difference of $1046.19. That difference consisted, besides costs, of the following items:

Money paid out for drayage	$ 46.10
Insurance premiums	178.89
Commission	698.10
Interest	123.10
Total	$1046.19

(Par. 6 plaintiffs' originial petition R. 2—; original judgment and op. Ct. Civ. App., Appendix.)

It is thus seen that not only was the original judgment modified in a material particular, and the substituted judgment of July 12 made more burdensome upon appellants to the extent of $1046.19; but a different construction was placed upon the contract involved in the two opinions, the construction placed thereon in the latter opinion resulting in the more burdensome judgment just indicated. Hence obviously the two cases last cited by appellants apply, as does the quotation at page 4 hereof from the case of *National Compress Co. v. Hamlin*. The second motion for rehearing in the Court of Civil Appeals was not a mere pretext to secure an extension of the time in which to complain of the ruling made, and thus extend the time in which to petition the State Supreme Court for writ of error; but it was a motion addressed to a new and different judgment and opinion of the Court involving a

more burdensome judgment and more burdensome construction of the contract involved, and lastly, it was a motion for rehearing addressed to the only judgment of the Court of Civil Appeals then and now in existence.

Appellees advert to the further fact that there was a dissenting opinion in the Court of Civil Appeals by Associate Justice Funderburk, and that such dissent would have conferred jurisdiction upon the State Supreme Court. From that circumstance it is argued that the action of the State Supreme Court in dismissing appellants' petition for writ of error as for want of jurisdiction indicates its decision that it was without actual jurisdiction to review the case because of the failure of Bain Peanut Company to file such petition in the Court of Civil Appeals within 30 days after July 12, 1929. The conclusion reached is obviously unsound. The judgment of the Court of Civil Appeals is not one of the class of judgments made final in the Court of Civil Appeals by statute; and it is true that the dissenting opinion by Judge Funderburk involving a question of law material to the decision raised a jurisdictional issue upon which the Supreme Court might have granted a review. It is also true, *dehors* the record, that Bain Peanut Company's petition for writ of error advanced the existence of the circumstance mentioned as one of the grounds why the Supreme Court of Texas should take jurisdiction. Appellees, at page 8 of the counter statement, impliedly admit that all possible jurisdictional matters were urged upon the State Supreme Court in Bain Peanut Company's petition for writ of error, because they say:

> "It seems to us that beyond question had Appellant properly invoked the jurisdiction of the State Su-

preme Court, by complying with the local practice act, it would have secured a hearing of the case."

The only alleged failure to comply with the local practice act with which appellees charge appellants consists in Bain Peanut Company's failure to file the petition for writ of error in the Court of Civil Appeals within 30 days after July 12, 1929. Had appellees' attorneys thought Bain Peanut Company derelict in any other matter of State procedure, we surmise they would have mentioned it.

The Court of Civil Appeals (R 69) disposed of the appeal primarily under an application of the doctrine of the law of the case. That Court held that it was precluded from re-examining the several issues presented, excepting the Federal question here presented, by the action of the State Supreme Court (Commission of Appeals), in ruling against Bain Peanut Company on those same questions on the former appeal. In appellants' original statement in support of jurisdiction we have referred to authorities disclosing the fact that the jurisdiction of the State Supreme Court is discretionary, and that it has authority to deny a review of a case within its potential jurisdiction, and properly presented, when, in its discretion such review should be denied. The opinion of the Court of Civil Appeals is reported in 19 S. W. (2nd), 203 to 207. That was the second appeal involving the merits of the case. The Commission of Appeals of Texas on former appeal, 292 S. W. 203, affirmed the case and ruled adversely to Bain Peanut Company on practically the precise questions decided by the Court of Civil Appeals below, excluding the Federal question involved on this appeal. On motion for rehearing, 294 S. W. 536, the Commission of Appeals reversed the case on one question not involved in

the last appeal. While this case was pending in the Court of Civil Appeals on the last appeal the State Supreme Court in *Grayburg Oil Comany v. Powell*, 15 S. W. (2nd) 542, sustained the validity of the section of our venue act involved in this appeal against the precise constitutional objection here urged; and the Court of Civil Appeals, following that decision, ruled against Bain Peanut Company upon that question on the last appeal. It is thus seen that when the petition for writ of error was presented to the State Supreme Court, it had previously determined, in one way or another, every question presented to it by that petition. It is true, as stated by appellees, that the State Supreme Court rarely indicates the ground upon which it denies or dismisses a petition for writ of error. It is equally true, as we have shown, that the case falls within the potential jurisdiction of the State Supreme Court and that all procedural steps looking to a review by it were followed in a timely and proper manner. Therefore, it seems unquestionable that the action of the State Supreme Court in dismissing Bain Peanut Company's petition for writ of error as for want of jurisdiction must be referred to Section 2 of Article 1728 Revised Civil Statutes 1925, as amended by Chapter 44 of the Acts of the Fortieth Legislature in 1927, viz:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; *in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.*" (Italics ours.)

Appellants, therefore, assert that the dismissal of Bain Peanut Company's petition for writ of error as for want of jurisdiction evidenced nothing more than the Supreme Court's refusal to exercise the discretionary jurisdiction to review the case.

Argumentatively, appellants suggest that had the contention now advanced by appellees for dismissal been advanced before the State Supreme Court they could have had their motion brought up in the present record by counter praecipe. That was not done. And if any such motion was made in the Supreme Court of Texas, appellants were never advised thereof and never had an opportunity to oppose it. Our Supreme Court rules require that appellants should have been furnished with a copy and notice of filing of all motions; and it is therefore asserted with confidence that no such motion or suggestion as appellees now present was ever presented to or considered by the State Supreme Court.

Appellants realize that practically everything stated by Appellees in their counter statement is outside the record before this Court; but they have felt that it is but fair to the Court and to themselves that the Court should be fully advised, and have accordingly attempted so to advise the Court.

Respectfully submitted with prayer that Appellee's motion to dismiss be denied.

B. L. Agerton

Counsel for Appellants.

BRYAN, STONE, WADE & AGERTON,

and

B. G. MANSELL,

Of Counsel.

APPENDIX

—o—

BAIN PEANUT COMPANY OF TEXAS
vs. No. 492
PINSON & GUYGER.

—o—

From the District Court of Comanche County.
May 3, 1929
Opinion by Leslie, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the Court that there was error in the judgment: It is therefore considered, adjudged and ordered that the judgment of the court below be, and the same is hereby reformed so that appellees, Pinson & Guyger, do have and recover of and from appellant, Bain Peanut Company of Texas, and its surety, United States Fidelity and Guaranty Company, the amount of $5,759.21 (the same including $677.63, the proportional part of the interest included in the judgment below), and as so reformed the judghent of the court below will be affirmed. It is further ordered that Dave Pinson and C. B. Guyger pay all costs incurred by reason of this appeal, for which let execution issue, and that this decision be certified below for observance.

THE STATE OF TEXAS,
COUNTY OF EASTLAND.

I, Dan Childress, Clerk of the Court of Civil Appeals for the Eleventh Supreme Judicial District of the State of Texas, do hereby certify that the above and foregoing

contains a true and correct copy of the original judgment in the above styled and numbered cause entered on the records in my said office on May 3, 1929, and as the same now appears.

Given under my hand and seal of office this 12th day of March, A. D. 1930.

DAN CHILDRESS, Clerk,
By Vera H. Phillips, Deputy.

BAIN PEANUT COMPANY OF TEXAS, *Appellant*,
vs.
PINSON & GUYGER, *Appellees*.

—o—

No. 492

—o—

Appeal From the District Court of Comanche County.

—o—

This is the third appeal of this case. The first was from a judgment on a plea of privilege, the second and third from trials on the merits. The last trial which was before the court and jury resulted in a judgment on special issues in favor of the plaintiff, and the defendant Bain Peanut Company appeals.

The appellees as partners brought this suit against the appellant for damages arising from a breach of an alleged contract which was specifically alleged in paragraph 1 of their petition, as follows:

> "That * * * on or about the first day of November, 1923, the defendant, Bain Peanut Company, acting through and by its duly authorized * * * agent, Bill Huxford, came to plaintiffs at Proctor, Comanche

County, Texas, and entered into a contract with plaintiffs by which it was agreed between the plaintiff's and defendant that the plaintiffs who were dealers in and purchasers of peanuts, would buy peanuts for the defendant on the open market during the peanut season of 1923 and 1924 which was then just beginning, and that plaintiffs would buy peanuts for no other parties. It was agreed that plaintiffs would pay their own money for the peanuts, which were to be purchased at the best price obtainable on the current market from day to day, and would store the said peanuts in a storehouse at Proctor, Texas, agreed on at the time between plaintiffs and defendant. That the said peanuts would be stored in such a manner as to cure and dry properly for shipment to the defendant's central plant or mill at Fort Worth, Tarrant County, Texas, where it was agreed that the peanuts would be shipped as soon as properly cured. That the plaintiffs would pay the storage and insurance on the peanuts while in storage, and drayage to the cars when they should be ready to ship to the defendant, as aforesaid. It was agreed that defendant would reimburse the plaintiffs for the original cost of the peanuts and for their insurance, storage and drayage, and pay the plaintiffs for their services a commission of ten cents on every bushel which they should buy for the defendant."

In subsequent paragraphs of the plaintiffs' petition, estoppel and ratification were pleaded, and further:

"That the plaintiffs, all during the said peanut season, conferred from time to time with the defendant's agent (Huxford) and acted under the direction of the defendant's agent in making the purchases and in storing and handling the peanuts."

It was alleged that under and by virtue of said contract the plaintiffs purchased 6,981 bushels of peanuts of

an aggregate value of $12,455.78, and that after said peanuts had been purchased, insured, stored, cured and handled in every way in accordance with the above mentioned contract, the plaintiffs demanded of the defendant, Bain Peanut Company, that it accept the shipment of peanuts and pay plaintiffs therefor according to the original contract. That the defendant refused to comply with the contract and rejected the peanuts, which were later sold by the plaintiffs for $7,374.20, the best price obtainable. This lawsuit is for the difference between that sum and the amount paid by plaintiffs for the peanuts, together with the sum of $46.10 drayage, $178.89 insurance, and an alleged commission of $698.10, aggregating $6,004.67, an alleged loss proximately resulting to plaintiffs by reason of the defendant's breach of the alleged contract, performable in Comanche County, Texas.

The defendant interposed a plea of privilege to be sued in Tarrant County, Texas, and the subject to this plea entered a general denial, etc.

The proposition on the court's action in overruling the plea of privilege to be sued in Tarrant County arises from the overruling of the defendant's demurrer to the plaintiffs' controverting affidavit. The plaintiffs rested their right to venue in Comanche County upon the ground that the suit was against a private corporation on a cause of action arising in whole or in part in that county. This involved plaintiffs' right to hold venue in that county under subdivision 23, Art. 1995, R. S., which subdivision has recently been held discriminatory against private corporations, and therefore, unconstitutional. See *Dublin Mill & Elevator Company v. Cornelius,* 5 S. W., (2d) 1027; *Houston Light & Power Company v. Jenkins,* 5 S. W., (2d) 1030. However, those cases have recently been

overruled by the Commission of Appeals in the opinion in the case of *Grayburg Oil Company v. N. P. Powell*, approved by the Supreme Court. The point calls for no further consideration and the proposition presented is overruled.

One of the main contentions of the appellant is that the trial court erred in refusing to grant a new trial because of the newly discovered evidence of the witness Chisholm. More than ordinary showing is made in support of this proposition. There is, however, one reason appearing which forces us to the conclusion that the case should not be reversed because of this matter alone. At the time of the former trial appellant had notice that this witness probably knew facts material to the case. When the witness was then asked by appellant's attorney about the matter he did not disclaim any such knowledge, but replied that if he was put on the witness stand he would tell the truth. This statement alone implied some knowledge. Appellant showed no lack of diligence by it failure to place him on the stand at that trial, not knowing what his testimony would be, and the trial being then in progress. Had this occurred at the last trial of the case when there was no time in a legal way to ascertain what he knew without being bound by what he said, we would be inclined to hold that appellant was fully acquitted of any want of diligence; but a year or more intervening between that time and the time the case was finally brought to trial, the appellant had ample opportunity to take the depositions of the witness and compel him to disclose his knowledge of the facts. Appellant having failed to do so, we think we would not be justified in holding that the trial court abused its discretion in refusing a new trial. Particularly do we think we are justified in this holding,

in view of the fact that the witness Chisholm, when later approached, voluntarily made and delivered to appellant an affidavit setting forth the testimony it is claimed he would give on a re-trial of the cause. This proposition is overruled.

The judgment of the court below is challenged on the ground that there was no evidence of any authority on the part of Huxford as agent of the Bain Peanut Company to make the contract in question. The same question was presented on the former appeal and it appears that at the last trial the cause was tried on the same pleading as at the first trial and on substantially the same testimony. (287 S. W., 87.) In discussing the above contentions on the former appeal, this court said:

> "It is not deemed necessary to discuss those assignments in detail. We believe that the record shows express authority in Huxford to act for appellant in so far as such authority is required to sustain the verdict as will be hereinafter more fully shown."

That opinion then proceeds as follows:

> "The charge as a whole was excepted to and a peremptory instruction requested because the evidence introduced had no basis in appellees' pleading. *It is asserted that the plaintiff's petition was based upon an alleged employment of appellees by Huxford as sub-agents for appellant to buy peanuts in unlimited quantities on their own judgment, and that the evidence showed conclusively that Huxford had no such authority.* It is agreed that Huxford did not have authority to employ appellees as sub-agents to buy peanuts for appellant in unlimited quantities on the unrestrained judgment of appellees as to quantities and price, but we do not concur in appellant's claim that such was the case made by the petition. *The petition alleged*

> *specifically that the peanuts were bought from day to day under the immediate direction and control of Huxford. This allegation is a sufficient answer to the contention noted.*" (Italics ours.)

From the above quotation and especially from the last underscored portion thereof, it conclusively appears that this court on the former appeal held that the plaintiff's petition sufficiently alleged a cause of action warranting recovery, at least, of the purchase price paid by Pinson & Guyger, for the peanuts. The evidence supports the conclusion that the peanuts were, in fact, purchased under Huxford's supervision. The fact that the former judgment did not include commissions and other expenses seems to have had an important bearing in determining the conclusions reached by this court upon the former appeal, as is indicated by the above quotations, as well as the following sentence from that opinion:

> "The evidence is deemed sufficient to show express authority on the part of Huxford to make the questioned contract, *particularly in view of the verdict, which allowed a recovery only for the purchase price of the peanuts and excluded any commission or expenses.*" (Italics ours.)

Thus it appears that on the former appeal it was expressly held, that Huxford had authority to make the questioned contract,——at least to the extent of binding his principal to reimburse Pinson & Guyger for the purchase price of the peanuts——and that the pleadings were interpreted as declaring upon such contract and as being a sufficient basis for the recovery of *the sum indicated.* On the former appeal the case reached the Supreme Court, and, upon an opinion by the Commission of Appeals the Supreme Court reversed the judgment of this court

and reformed and affirmed the judgment of the district court. In the Commission's opinion this languauge is used:

> "While there are thirty assignments of error contained in the application, none, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court." (292 S. W., 203.)

The assignment sustained in that opinion raised a question of the right to recover interest as damages, etc. On motion for rehearing the Commission of Appeals, in its second opinion used this language:

> "In our former opinion in this case we stated that, 'while there are thirty assignments of error contained in the application, *none*, other than that raising the question here discussed, presents an error which would require reversal or reformation of the judgment of the trial court.' 292 S. W., 203. We are now of the opinion that one of the assignments does pesent reversible error." (294 S. W., 536.)

The assignment this time sustained was to the action of the court in admitting hearsay testimony. The judgments of the district court and the Court of Civil Appeals were reversed upon the recommendation of the Commission upon that sole question.

Evidently the Supreme Court, through said opinions by the Commission, approved the interpretation or construction placed on the pleadings by this court on the former appeal, and resolved against the appellant the contention that Huxford had no authority to make with Pinson & Guyger the contract, at least to the extent of reimbursing them for the purchase price of the peanuts. The assignments raising the question of no evidence of any authority

on the part of Huxford as agent of the Bain Peanut Company to make the questioned contract having been considered, (as evidently appears from the last quotations) and overruled, by the Commission, with the approval of the Supreme Court, as well as by this court, and the pleadings remaining unaltered, the testimony admittedly the same, the trial court having followed the former holdings, and the errors working a reversal of the judgment of the trial court on the first trial having been removed, we believe that, in obedience to said opinions, said assignments (again appearing in this record presenting the same contention) should be overruled, and the judgment affirmed, at least to the extent of the recovery for purchase price of the peanuts. In doing so we regard the questions presented by the assignments as no longer open questions in this court, but as being questions which the Supreme Court only, if any court, should reopen.

However, since the former opinions went no further than to allow recovery for the purchase price of the peanuts, and believing that Huxford was not authorized under the record to bind his principal to pay commissions and expenses to appellees, the judgment of the trial court will be reformed so as to permit recovery of the purchase price of the peanuts, as approved in said opinions.

The judgment of the trial court will be reformed and as reformed will be affirmed.

W. P. LESLIE,
Associate Justice.

May 3rd, 1929.

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THE STATE OF TEXAS,
COUNTY OF EASTLAND.

I, Dan Childress, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Original opinion handed down by W. P. Leslie, Associate Justice, on May 3rd, A. D. 1929, in the case of Bain Peanut Company of Texas vs. Pinson & Guyger, No. 492, as the same appears now on file in my said office.

Given under my hand and seal of office this 12th day of March, A. D. 1930.

DAN CHILDRESS,
Clerk Court Civil Appeals,
11th Supreme Judicial District of Texas.